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7
8 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

9
10 GREMLIN INDUSTRIES, a)
Delaware Corporation, and)
11 DOES 1 through 10, inclusive,)
Plaintiff and)
12 Cross-Defendants,)
13 vs.)
14 CIRCLE INTERNATIONAL CO.,)
INC., etc., et al.,)
15 Defendant and)
16 Cross-complainant)

No. 416 704

CROSS-COMPLAINT FOR DAMAGES

1. BREACH OF CONTRACT;
2. BREACH OF WARRANTY OF FITNESS FOR INTENDED USE;
3. BREACH OF WARRANTY OF MERCHANTABILITY; and
4. TREBLE DAMAGES FOR UNFAIR TRADE PRACTICES

17
18 CROSS-COMPLAINANT, CIRCLE INTERNATIONAL CO., INC., a
19 California corporation (hereinafter referred to as "CIRCLE")
20 complains and alleges:

21
22 FIRST CAUSE OF ACTION:

23 BREACH OF CONTRACT:

24
25 1. That the true names and capacities, whether individual,
26 corporate, associate, or otherwise of cross-defendants, DOES 1
27 through 10, inclusive, or of any one of them, are unknown to Cross-
28 Complainant who therefore sues said cross-defendants, and each of

1 them, by such fictitious names. Cross-complainant is informed and
2 believes, and thereon alleges, that each of the cross-defendants
3 designated herein as a fictitiously named cross-defendant is in
4 some manner responsible for the events and happenings herein
5 referred to, and caused the damage to Cross-complainant as herein
6 alleged. When Cross-complainant ascertains the true names
7 and capacities of said fictitiously named defendants, or of any
8 one of them, Cross-complainant will ask leave of this Court to
9 amend this Cross-complaint by setting forth the same.

10
11 2. At all times herein mentioned or relevent, Cross-
12 complainant CIRCLE, was, and still is a corporation duly organized
13 and existing and by virtue of the laws of the State of California.

14
15 3. Cross-complainant is informed and believes, and there-
16 on alleges that at all times herein mentioned, or relevent, cross-
17 defendant GREMLIN INDUSTRIES, INC., was, and is, a corporation
18 duly organized and existing under and by virtue of the laws of
19 the State of Delaware, and at all times herein mentioned, or
20 relevent, was and is qualified to conduct business, and conducting
21 business within the State of California; with said cross-defendants'
22 principal place of business being located in the County of San
23 Diego, State of California.

24
25 4. The within action is not subject to the provisions of
26 Section 1801, et seq., of the CIVIL CODE OF THE STATE OF
27 CALIFORNIA. That the within action is not subject to the provisions
28 of Section 2981, et seq., of the CIVIL CODE OF THE STATE OF

1 CALIFORNIA.

2
3 5. At all times herein mentioned, or relevant, each of
4 the cross-defendants named in the caption of this Cross-complaint,
5 which is incorporated herein by this reference, was, and is, the
6 agent, servant, and employee of each of the other cross-defendants
7 and all of the things alleged to have been done by said cross-
8 defendants were done in the capacity of, and as agent of the
9 other corss-defendants.

10
11 6. On or about November 1, 1977, Cross-complainant
12 CIRCLE and cross-defendant GREMLIN entered into an oral contract
13 wherein it was agreed that cross-defendant GREMLIN would sell
14 electronic games and/or parts for said games to Cross-complainant,
15 with the price for each order for said games or parts to be at
16 cross-defendant GREMLIN's regular established distributor prices.

17
18 7. Further, Cross-complainant CIRCLE and cross-defendant
19 GREMLIN agreed that each and all of said games and/or parts would
20 be of first quality, with no seconds, rejects, or defectives; since
21 each and all of said goods were to be resold by Cross-complainant
22 CIRCLE to ultimate consumers who were primarily arcades, taverns,
23 and bars which would use said products in heavy commercial use.

24
25 8. Beginning in or about November, 1977, cross-
26 defendant GREMLIN breached its agreement with Cross-complainant,
27 CIRCLE, in that said cross-defendant sold and delivered to Cross-
28 complainant CIRCLE, vast numbers of said electronic games which

1 were defective, and failed to operate properly due to broken or
2 missing parts, shoddy workmanship, or improper assembly during
3 manufacture; thus rendering said goods of no value to Cross-
4 complainant, for resale or otherwise. Further, cross-
5 defendant GREMLIN breached its agreement with Cross-complainant
6 by failing to timely deliver numerous orders, thus resulting
7 in Cross-complainant's customers cancelling their orders with
8 Cross-complainant.

9
10 9. As a direct and proximate result of cross-defendant
11 GREMLIN's breach of its agreement with Cross-complaint, Cross-
12 complainant CIRCLE could not fill orders to its customers on
13 time, thus causing said orders to be cancelled; Cross-complainant
14 had to pay its service department personnel over-time premium pay
15 to attempt to correct said defects, in order to be able to ship
16 said electronic games; Cross-complainant incurred additional
17 handling costs; Cross-complainant had to issue credits to some of
18 its customers; and Cross-complainant lost profits on sales. The
19 exact amount of Cross-complainant's damages have not yet been as-
20 certained, however, Cross-complainant CIRCLE is informed and be-
21 lieves, and thereon alleges, that said damages exceed the sum of
22 \$100,000.00. Cross-complainant will seek leave of Court to amend
23 its Cross-complaint to set forth the exact amount of its damages
24 once said damages have been ascertained, or according to proof
25 at time of trial.

26
27 10. Cross-complainant has duly performed all conditions
28 precedent, concurrent, or subsequent on its part required to be

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performed; except such conditions as have been excused by cross-defendant GREMLIN's breach of its agreement with Cross-complainant as hereinabove alleged.

SECOND CAUSE OF ACTION:

BREACH OF WARRANTY OF FITNESS FOR INTENDED USE:

11. Cross-complainant repeats and realleges the allegations contained in Paragraphs 1 through 9, inclusive, of its First Cause of Action, and by reference thereto incorporates same herein as though set forth in full.

12. At the time and place of each order from Cross-complainant CIRCLE, to cross-defendant GREMLIN, Cross-complainant CIRCLE made known to GREMLIN the particular purpose for which the goods were purchased. In particular, Cross-complainant informed cross-defendant GREMLIN that said electronic games were to be sold to Cross-complainant's customers for on-location use, primarily in arcades, taverns, and bars. Cross-complainant CIRCLE at the time and place of each such order relied on cross-defendant's skill and judgment to select goods suitable for said cross-complainant's purpose, all of which was well known to said cross-defendant.

13. Cross-defendant GREMLIN at the time and place of each order impliedly warranted that the goods were fit for Cross-complainant's purposes hereinabove alleged.

14. The goods were not fit for Cross-complainant CIRCLE's

purpose, but were, in fact, unsuitable for said purpose in that vast numbers of said electronic games and/or parts were defective, and failed to operate properly due to broken or missing parts, shoddy workmanship, or improper assembly during manufacture; thus rendering said goods of no value to Cross-complainant CIRCLE for resale, or otherwise.

15. That immediately upon discovery of said defects, beginning in early November of 1977, Cross-complainant CIRCLE discovered that the warranty of cross-defendant was false, and immediately gave to cross-defendant GREMLIN due and timely notice thereof; but received no rectification of the aforescribed defects from cross-defendant.

16. By reason of the foregoing, Cross-complainant CIRCLE could not fill orders to its customers on time; thus causing said orders to be cancelled, and profits thereon to be lost; Cross-complainant had to pay service department personnel at Cross-complainant's premises over-time premium pay to attempt to correct said defects; Cross-complainant incurred additional handling costs; and Cross-complainant had to issue credits to some of its customers. The exact amount of Cross-complainant's damages have not yet been ascertained, but Cross-complainant is informed and believes, and thereon alleges that damages exceed the sum of \$100,000.00. Cross-complainant will seek leave of Court to amend this Cross-complaint when the exact amount of damages have been ascertained, or according to proof at the time of trial.

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17. Cross-complainant repeats and realleges the allegations contained in Paragraphs 1 through 9, inclusive, of its First Cause of Action, and by reference thereto incorporates same herein as though set forth in full.

18. That beginning on or about November 1, 1977, Cross-defendant GREMLIN sold to Cross-complainant CIRCLE electronic games and/or parts to be used by said Cross-complainant for resale to its customers primarily for commercial on-location use at arcades, taverns, and bars.

19. At all times herein mentioned, or relevant, cross-defendant GREMLIN was, and now is, a merchant with respect to the kind of goods sold to Cross-complainant, as hereinabove alleged and described.

20. Cross-defendant GREMLIN at the time and place of each said sale impliedly warranted that said electronic games and/or parts were of merchantable quality.

21. Said electronic games and/or parts were not of merchantable quality, but, in fact, were defective in that many of said games and/or parts failed to operate properly, had missing or broken parts, or were improperly assembled during manufacture.

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22. Therefore, said electronic games and/or parts were of absolutely no use to Cross-complainant, had no value, and could not be sold to Cross-complainant's customers.

23. Beginning in early November, 1977, immediately upon discovery of each defect, as hereinabove alleges, Cross-complainant gave cross-defendant GREMLIN due and timely notice of the defective quality of said goods.

24. By reason of the foregoing, Cross-complainant CIRCLE could not fill orders to its customers on time, thus causing said orders to be cancelled, and profits thereon to be lost; Cross-complainant had to pay service department personnel on Cross-complainant's premises over-time premium pay to attempt to correct said defects; Cross-complainant incurred additional handling costs; and Cross-complainant had to issue credits to some of its customers. The exact amount of Cross-complainant's damages have not yet been ascertained, but Cross-complainant is informed and believes; and thereon alleges, that said items of damages exceed the sum of \$100,000.00. Cross-complainant will seek leave of Court to amend its Cross-complaint when the exact amount of damages have been ascertained, or according to proof at time of trial.

FOURTH CAUSE OF ACTION:

TREBLE DAMAGES FOR UNFAIR TRADE PRACTICES:

25. Cross-complainant repeats and realleges the

allegations contained in Paragraphs 1 through 9, inclusive, of its First Cause of Action, and by reference thereto incorporates same herein as though set forth in full.

26. Cross-defendant GREMLIN is the sole manufacturer and only source of the electronic game products and/or parts which it manufactures. Further, said cross-defendant only sells its products, including parts, to distributors for resale to the ultimate purchaser.

27. At all times herein mentioned, or relevant, Cross-complainant CIRCLE was, and is, a distributor of products and/or parts manufactured by cross-defendant. Further, cross-defendant GREMLIN since in or about November, 1977, has been selling its electronic game products and/or parts to other distributors who compete with Cross-complainant CIRCLE in the same marketplace, and who are in the same category of a distributor, as is Cross-complainant CIRCLE.

28. Since at least in or about November, 1977, Cross-defendant has offered for sale and sold to other distributors, aside from Cross-complainant CIRCLE, and who are in direct competition with Cross-complaint CIRCLE, in the same marketplace, each and all of cross-defendant GREMLIN's products at cross-defendant's normal established prices; while at the same time forcing Cross-complainant CIRCLE to pay a 150% "premium price" for such games and/or parts.

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29. Accordingly, said cross-defendant GREMLIN has been engaging in an unfair trade practice in that said cross-defendant has charged to Cross-complainant CIRCLE a price differential which is discriminatory, as compared to the price for which cross-defendant's games and/or parts were sold by cross-defendant to others in the same functional classification as a distributor, as is Cross-complainant CIRCLE.

30. Said acts of cross-defendant GREMLIN have been, and are, intentional and for the purpose of injuring and/or destroying Cross-complainant CIRCLE's competitive marketplace position.

31. As a direct and proximate result of said acts of cross-defendant GREMLIN, Cross-complainant CIRCLE has been deprived of the patronage of a large number of its actual and potential customers, all to its damage in a sum which Cross-complainant CIRCLE is informed and believes, and thereon alleges, exceeds \$100,000.00. Further, Cross-complainant CIRCLE is entitled to treble its actual damages, plus costs and attorneys' fees, pursuant to the provisions of CALIFORNIA BUSINESS AND PROFESSIONS CODE, Section 17802. When Cross-complainant CIRCLE ascertains the exact amount of its damages, it will seek leave of Court to amend this Cross-complaint to set forth the same, or according to proof at time of trial.

WHEREFORE, Cross-complainant prays for judgment against cross-defendants, and each of them, as follows:

1. For actual damages in the sum of \$100,000.00,

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or according to proof;

2. For treble Cross-complainant's actual damages in the sum of \$300,000.00, or according to proof;
3. For reasonable attorneys' fees pursuant to CALIFORNIA BUSINESS AND PROFESSIONS CODE, Section 17802;
4. For costs of suit incurred herein; and
5. Such other and further relief as the Court deems just and proper.

DATED this 18th day of September, 1978.

KIRSCH, ARAK AND BULMASH

Richard J. Greene
RICHARD J. GREENE, Attorneys for
Cross-complainant,
CIRCLE INTERNATIONAL CO., INC.